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NOTES

CONFLICT OF LAWS: THE PLURALITY OF LEGAL SYSTEMS: AN ANALYSIS OF 25 U.S.C. §§ 1901-63, THE INDIAN CHILD WELFARE ACT

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Traditional North American tribal dispute settlement methods present a "legal system" which has, in modern times, been augmented by the development of tribal court systems, each with varying levels of law and custom. Imposed upon the confusing juxtaposition of the two often-contradictory tribal systems are the federal and state legal systems, which conflict not only with each other but also, inevitably, with both tribal systems. It is not surprising that numerous conflicts arise in adjudicating cases in which tribes, states, and the federal government have an interest.

The conflicts arise out of basic differences in cultures, priorities, and locale. They are aggravated by each group's desire to control its own destiny and by its conviction that its particular characteristics and needs are best known to the members of the individual groups. For an Indian person who is simultaneously a member of several groups and subgroups—from family and clan to tribe, state, and nation—the conflicts are not often easily resolved.

The Indian Child Welfare Act is a codification of a developing compromise among the various legal systems. The federal fiduciary, through the Act, has relinquished its interest, creating an arena for state and tribal activity, provided that the two function according to statutory guidelines. In doing so, the states acknowledge certain tribal customs and interests in return for tribal acceptance of certain state procedures and interference.

In order better to understand exactly how the Act works, it is important to understand the relative positions of tribes and states. For most of the period of their coexistence, it has been the tribes that have been required to adapt, not the states. As they have done so, however, the states have found themselves in an increasingly less powerful position. Originally, the tribes were forced to accept the new legal system imposed upon them by the state and federal governments. Eventually, in response to the im-

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position, many tribes began to develop their own modern systems, modeled on non-Indian systems, but still incorporating, in many instances, traditional tribal ways. Simultaneously, tribes were developing in other areas as well, occasionally rendering traditional ways less desirable, even unfeasible. Societal acceptance of the non-Indian legal systems slowly, and sometimes only partially, led to psychological changes and acceptance on the part of individual tribal members.

The changes in the tribal-state relationship have occurred in a number of ways, some the product of mutual agreement. And the changes have occurred on different levels, both within states and within tribes. Stability, originally guaranteed by kinship solidarity in tribes, became increasingly dependent upon legal procedures. Nonetheless, tribal interest in custom and domestic relationships continues to exist, and conflicts develop in many instances because of non-Indian ignorance of and lack of concern for Indian priorities and beliefs. Progress has led to changes in the federal and state legal systems, the result being a conscious desire to recognize and work with traditional Indian cultures. Progress has also served to allow tribes to develop tribal court systems that are acceptable to and recognized by both Indians and non-Indians alike. Of course, this has happened with varying degrees of success, as each tribe has unique characteristics, needs, and abilities. And because even these characteristics are changing, the respective legal systems, and their interrelation with other legal systems, are changing. The Indian Child Welfare Act is a response to some of these changes, within both Indian and non-Indian communities, as new tensions and problems arise and are resolved.

Because of the presence of several different levels of law—within each tribe, among tribes, and between tribes and states—the conflicts that arise are frequent and often not easily solved, if solvable at all. The process by which resolution occurs also differs, depending upon which legal system or level is involved. There are adoption and custody disputes between members of the same tribe, between members of different tribes, and between Indians and non-Indians; often resolution of the dispute turns upon a determination of kinship, domicile, tribal membership, or sovereign interest. The Indian Child Welfare Act attempts to outline procedures for handling most of these problems, though it cannot be applied to all, and though it is unclear, in many cases, exactly what the Act purports to do. Questions of jurisdiction or choice of law are not always easily answered, though the Act attempts to do so. Many questions will remain

unanswered until litigation clarifies certain definitions, procedures, and intent. The Act, meanwhile, stands as a unique attempt to codify the dynamics (procedural interaction) among the several legal systems and levels, and as such may serve as an analogous model for interactions in other areas of disputes, *e.g.*, taxation, natural resource development, law enforcement, regulation.

Multiplicity of Legal Systems

Analysis of any given law is frequently confined to discussions of precedent, legislative history, and policy; and analysis of any given legal system is frequently confined to discussions of its laws. The shortcomings of such analyses are in their failure to recognize and include the dynamics of subgroup laws and customs and of interdependent legal levels. Noted legal anthropologist Leopold Pospisil, recognizing the inherent shortcomings in traditional legal analyses, concluded "that any penetrating analysis of law of a primitive or civilized society can be attained only by relating it to the pertinent societal structure and legal levels, and by a full recognition of the plurality of legal systems within a society."[1]

Contemporary thought does not conceive of law as unique to civilized societies; it does not treat law as an "autonomous institution," to be viewed apart from the cultural whole; nor does it assume that law is unaffected by the political, social, cultural, and economic forces within a society.[2] Rather, the trend is to view law as many-faceted, dependent not only upon legislation but also upon custom and equity, functioning on different levels, and interrelating with the laws and legal systems of the many subgroups which invariably exist within a society. Such a conceptualization of law is especially useful in any analysis of laws that affect tribal life in America, for the unique juxtaposition of legal systems of tribal, state, and federal governments requires careful consideration and understanding if analysis is to be useful at all.

The dispute over exactly what "law" is and where it can be found has led to many theories about the relationship of law to society, custom, and norms. Though, clearly, law cannot be treated as if in a complete vacuum, some theorists would prefer to downplay the effect of sociology on legal reasoning, in part because of the increased number of factors that must then be

1. L. POSPISIL, ANTHROPOLOGY OF LAW 126 (1971) [hereinafter cited as POSPISIL].
2. *Id.* at ix-x.

considered.[3] On the other hand, there are theorists who would willingly consider various social factors as long as a distinction were made between law, custom, and norm.[4] Pospisil takes a more integrative approach, distinguishing between customary law—that which is internalized by a group and which signifies proper behavior—and authoritarian law—that which has been propounded by a strong minority group, which is considered to represent the ideal, and which has not been internalized by the group as a whole. The difference between the two depends purely on the degree of internalization and, as such, is subject to change as individuals and societies internalize or deinternalize any given law.[5] Thus, a law may originate either from the realm of custom (as when the legal authority accepts custom as the basis of its decisions) or from the realm of political or legal authority (at which point society as a whole is obligated to comply, whether it agrees or not).[6]

Traditional tribal law is for the most part customary law and is an essential part of tribal life. "Every portion of it is equally binding and has the same reputed origin; every portion equally belongs to the traditions of the tribe and is a sacred inheritance from the tribal ancestors. The law is a manifestation of the tribal life, as indivisible as life itself."[7] Of course, such law is subject to change as the result of contact with other societies or new environments, or as the result of internal tribal growth and development.

Among tribal groups there are wide variations in the ways in which disputes among members are handled, and in the ways in

3. G. SAWER, LAW IN SOCIETY 15 (1965) [hereinafter cited as SAWER].

4. "Customs are norms or rules (more or less strict, and with greater or less support of moral, ethical, or even physical coercion) about the ways in which people must behave if social institutions are to perform their tasks and society is to endure. All institutions (including legal institutions) develop customs. Some customs, in some societies, are *re*-institutionalized at another level: they are restated for the more precise purposes of legal institutions. When this happens, therefore, law may be regarded as a custom that has been restated in order to make it amenable to the activities of the legal institutions. In this sense, it is one of the most characteristic attributes of legal institutions that some of these 'laws' are about the legal institutions themselves, although most are about the other institutions of society—the familial, economic, political, ritual, or whatever." Bohannon, *The Differing Realms of the Law*, at 35-36, in 67 AMERICAN ANTHROPOLOGIST #6, pt. 2 (1965) [hereinafter cited as Bohannon].

5. POSPISIL *supra* note 1, at 196-97.

6. *Id.* at 204-205. *But see* T. DAVITT, BASIC VALUES IN LAW 32 (1978) ("An unjust law is no law.") [hereinafter cited as DAVITT].

7. E. HARTLAND, PRIMITIVE LAW 8 (1924) [hereinafter cited as HARTLAND].

which third parties may intervene.[8] To a degree, variations are attributable to the type of society or government handling the dispute. For example, as British legal anthropologist Simon Roberts suggests:

> Where centralized governments and adjudicatory processes of dispute settlement are found, rules are likely to be clear-cut and of crucial importance in decision-making, leaving little room for the operation of extra-normative criteria. On the other hand, in stateless societies where such settlement-directed talking as takes place is likely to be negotiatory, rules will be vague and of limited importance in reaching an outcome, leaving much greater play for pragmatic elements such as the physical, political and economic strength of the disputants.[9]

The difficulty comes often as the result of a juxtaposition of one or more of such legal systems, as differences in both procedural and substantive law, resulting from differences in needs, structure, and perspective, inevitably give rise to conflict. Failure to recognize the presence of the many and disparate legal systems of the functioning subgroups of a given society can only result in an inaccurate analysis and understanding of its legal dynamics. Pospisil emphasizes the danger of considering law as unrelated to social structure:

> This multiplicity of legal systems, whose legal provisions necessarily differ from one to another, sometimes even to the point of contradiction, reflects precisely the pattern of the subgroups of the society—what I have termed "societal structure" (structure of a society). Thus, according to the inclusiveness and types of the pertinent groups, legal systems can be viewed as belonging to different legal levels that are superimposed one upon the other, the system of a more inclusive group being applied to members of all its constituent subgroups. As a consequence, an individual is usually exposed to several legal systems simultaneously—to be exact, to as many systems as there are subgroups of which he is a member. This conception of society as a patterned mosaic structure of subgroups with their specific legal systems and with a dynamic center of power brings together phenomena and processes of a basically legal nature that otherwise would be put into nonlegal categories and treated as being qualitatively different.[10]

8. S. ROBERTS, ORDER AND DISPUTE 54-55 (1979) [hereinafter cited as ROBERTS].
9. *Id.* at 175.
10. POSPISIL, *supra* note 1, at 125.

Nowhere is such a concept better exemplified than in the relationship among federal, state, and tribal governments in the United States, for here must be considered not only the interaction of the state and federal authoritarian laws but also the interaction of the tribal authoritarian laws (as manifested in tribal codes) with tribal customary laws (occasionally, but not always, considered by or consistent with the tribal codes). Though conflicts of laws between Indian and non-Indian systems have been litigated extensively for nearly two hundred years, almost no consideration at all has been given to the conflicts between and within tribal systems. Because of the unique relationship between the United States and the indigenous peoples within her boundaries, many issues arise that are not readily understood or resolved without a clear perception of the origin and dynamics of each of the legal levels and systems.

Conflicts Between Legal Levels and Legal Systems

A primary area of conflict is that between traditional tribal law and codified law, be it tribal, state, or federal. This conflict has frequently been overlooked, partly as the result of emphasis on conflicts between the codes themselves and partly as the result of nonacceptance of traditional ways as "law." Legal analysts have been uniformly unwilling to deal with "laws" that are unwritten, that perhaps exhibit no clear sanctions, and that are not exercised within the framework of a legal institution, *e.g.*, without courts, judges, lawyers, and firm rules. Legal anthropologists have often been hindered by similar prejudices as to the nature of "law," the result being polarization on the issue of whether so-called primitive, traditional societies in fact are organized along any sort of legal lines. The more recent and perhaps most realistic trend has been to recognize custom as a part or form of law, not requiring written regulations, institutional trappings, or physical sanctions. The division of law into customary and authoritarian law recognizes the importance and potency of custom as law without requiring that custom be measured against the standards and attributes of what is more commonly admitted to be "real law." The absence of written regulations, judges, and courts does not necessarily indicate that a society is lawless.[11]

11. DAVITT, *supra* note 6, at 34-36. "We can see without difficulty in primitive societies what may well be the origins of legal systems; characteristic features of what we

> In the face of clear evidence that these [preliterate] groups preserved order and had a concern for justice, [certain researchers] continued to report that some societies of preliterates were "lawless." Rather than question whether their ideas of law were correct, they questioned whether these people had any law.
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> To other anthropologists and ethnologists it seemed incongruous to hold that these societies which maintained order and cared for justice were "lawless." It became obvious that the command theory and the court theory of law had to give way in the face of the facts. What became more and more evident was that these peoples had law. They themselves made law in their custom regulations which related to their common welfare. The essence of what was termed law in literate societies was present in the custom law of preliterate people.[12]

Custom law in traditional societies controls many areas of life, including what we would call domestic relations; however, the presence and functioning of kinship customs is largely unfamiliar to members of a society that does not recognize clans or intricate nonconsanguine relationships, or at least does not recognize such concepts as being of primary significance. For those North American tribes organized along kinship and clan lines, the essential functioning unit is the kin, of which the individual is but a part.[13] This concept of relationship is vital in determining numerous activities and behaviors, from marriage and instruction to discipline and warring. Clan membership carries with it rights, duties, responsibilities, and behavioral attitudes which, in general American culture, characterize relationships only between consanguine family members, if then. The extended family and clan relationships prevalent among traditional North American tribes cannot be ignored or given secondary importance in dealing with domestic relations between tribal members, and failure to

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now regard as law are more apparent in the structure of rules and the way they are discussed than in the institutions for the enforcement of those rules, but even on the institutional side there are not wanting practices and procedures which suggest later developments. But perhaps the main importance of such studies is to show that relatively complex social arrangements can be maintained for long periods without the institutions which in modern society are regarded as necessary for a 'rule of law'." SAWER, *supra* note 3, at 47.

12. DAVITT, *supra* note 6, at 41.

13. HARTLAND, *supra* note 7, at 48. *See also* POSPISIL, *supra* note 1, at 187-90 for an insight into Hoebel's pioneering approach to law systems.

recognize the significance and dynamics of such relationships can only lead to difficulties in regulating and enforcing family laws.

The development of extended family and clan systems originally guaranteed peace and order within a community.[14] Cooperation and solidarity between kinsmen were intricately regulated by custom, inhibiting disputes and social disorders.[15] Adoption among many tribes in America occurred for religious, economic, or social reasons, to perpetuate family lines, or to mitigate taboos or financial hardship.[16] Necessarily, the concept of adoption and foster care within a traditional tribal society differs from such a concept in American society as a whole, where the concern is primarily for the individual—specifically, the child—and not for the extended family, clan, or tribe. Consideration of tribal and family welfare as a whole may be recognized as an important factor by non-Indians but is not usually given much weight in federal and state family courts exercising jurisdiction over placement of Indian children.[17]

Because of the historical circumstances, there was no way to avoid the juxtaposition of various legal systems in this country. Frequently when one group is overpowered or conquered by another group, the subordinated peoples are forced to accept, and eventually assimilate, the systems of the dominant group.[18] In many cases, however, assimilation is unsuccessful, and the generally smaller and more traditional or primitive group remains a subgroup within the larger society while maintaining many of its old customary laws in one form or another.[19]

Conflict arises not only when customary law is supplanted by the laws of a conquering society but also when customary law is supplanted, or at least augmented, by authoritarian law developed within the subordinate subgroup. Such conflicts are exemplified, with all the intricate inner workings, in this country's

14. HARTLAND, *supra* note 7, at 193-94.

15. ROBERTS, *supra* note 8, at 14.

16. *See, e.g.*, HARTLAND, *supra* note 7, at 36; H. DRIVER, INDIANS OF NORTH AMERICA 226, 368 (1961).

17. *See* POSPISIL, *supra* note 1, at 118-19 for other examples of similar conflicts.

18. HARTLAND, *supra* note 7, at 36-37.

19. "On the other hand this adherence to the customs and laws of their forefathers is by no means absolute. Its appearance is deceptive to the people themselves. Circumstances are always, if slowly, changing, often so slowly that the people themselves are unaware of the change; and the laws and customs necessarily change with the circumstances. When this is the case the old superseded practices are forgotten, and the fact of the change, to say nothing of its details and direction, passes beyond recall." *Id.* at 202-203.

relationships with its indigenous societies. There are the inevitable and obvious conflict between the traditional tribal ways and the superimposed government ways; and there are the more subtle but equally problematic conflicts between traditional and modern tribal ways. While the federal, state, and tribal governments and courts litigate and quarrel over jurisdictional and substantive issues, there are occurring many conflicts on lower legal levels between traditionalists (who would adhere to the old customs and rules) and the modernists (who would work within the framework of the tribal systems modeled along federal guidelines). Conflict is simultaneously intergroup and intragroup, then, and the distinction is often difficult to make because of an individual's concurrent membership in numerous subgroups.[20]

In a child custody proceeding, the dispute can be complicated by the existence of distinct legal levels and systems. If a child is the product of an intertribal marriage, just placement alone may require looking into the custom of two clans, two tribes (and the differences between the tribal customs of, for example, the Navajo and the Santa Clara are rarely recognized, let alone understood by nonmembers), as well as the tribal codes of both tribes; this in addition to considering the individuated evidence of the particular fact situation and the possible conflict between two states' codes. And that is only the beginning, since the federal laws must also be contended with. It would be naive to suppose that conflicts of law will not arise at many, if not all, levels.

While the conflict between traditional and contemporary tribal laws occurs, the more obvious and immediate struggle between state and tribal laws dealing with the placement of Indian children in foster and adoptive homes has in the past led to the breakup of Indian families, serious adjustment problems for the children involved, and a resultant loss of identity for such children and, thus, for their tribes. As tribal governments and courts grew in power and sophistication, they began to assert more control over the placement and adoption of tribal children, and developing precedent began to recognize the tribal interest in such areas.[21] Yet, in many instances, the state courts insisted upon asserting jurisdiction over such matters, especially in cases where domicile was not clear-cut or where one of the parents of a child was not Indian.[22]

20. ROBERTS, *supra* note 8, at 49-51.

21. *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

22. *See, e.g.*, *In re* Duryea, 115 Ariz. 86, 563 P.2d 885 (1977); *In re* Adoption of

The difficulties in having placement and adoption proceedings handled by state courts are obvious: misunderstanding, or complete lack of understanding, of traditional tribal customs, priorities, and behavior inevitably led welfare agencies, social workers, and courts to make determinations that were damaging not only to the children and families but also to the tribal systems. An inordinate percentage of Indian children were removed from their homes, and, to add insult to injury, they were usually placed in non-Indian homes where adjustment and loss of cultural identity compounded the problems.[23]

The Indian Child Welfare Act of 1978 was designed to counter some of these problems, primarily by encouraging greater tribal participation in the adjudication of child welfare and by specifying standards and procedures for state courts which must still deal with the issue of custody, placement, and adoption at one point or another in the adjudication.[24]

Though the Act itself is not earthshaking in its specifications, as it follows to a large degree the precedent established by decisions such as *Fisher v. District Court*,[25] *Wakefield v. Little Light*,[26] and *Wisconsin Potowatomies v. Houston*,[27] it is important for its recognition of at least some of the intricacies and pitfalls inherent in the coexistence of multiple legal systems and cultures, as well as for the simple fact of its codification of the procedures and considerations to be exercised by the various courts and

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Doe, 89 N.M. 606, 555 P.2d 906 (1976); *In re* Greybull, 23 Or. App. 674, 543 P.2d 1079 (1975); *In re* Cantrell, 159 Mont. 66, 495 P.2d 179 (1972).

23. *See* Miles, *Custody Provisions of the Indian Child Welfare Act of 1978: The Effect on California Dependency Law,* 12 U.C.D. 651-54 (1974) [hereinafter cited as Miles]; Limprecht, *The Indian Child Welfare Act—Tribal Self-Determination through Participation in Child Custody Proceedings,* 4 WIS. L. REV. 1202-1203 (1979) [hereinafter cited as Limprecht]; Kirkwood, "The Indian Child Welfare Act of 1978: Jurisdiction, Choice of Law, and Recognition of Judgments" 1-2 (1979) (unpublished work in American Indian Law Center Library) [hereinafter cited as Kirkwood].

24. Kirkwood, *supra* note 23, at 3. "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. § 1902 (1978).

25. Fisher v. District Court, 424 U.S. 382 (1976).

26. Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

27. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973).

agencies involved in child welfare proceedings. The process by which both tribal and nontribal societies arrived at such a working relationship is an interesting example of the dynamics and changes in legal systems, as the social and legal institutions respond to changing needs and attitudes within their respective groups.

As developments occur in the area of Indian child welfare, it would be inaccurate to suppose that only the tribes and their customs and laws have changed, for certainly the non-Indian societies and their institutions have been forced, in one way or another, to recognize and to accommodate the differences and conflicts between the various cultures. The major changes, however, have been within the tribal communities, which have been pressured by numbers, economics, and technologies to adapt to alien concepts, procedures, and life-styles. Nonetheless, it should be kept in mind that a discussion of changes in legal systems, while analyzed here primarily in terms of changes as they affect tribal peoples, is also applicable in many ways to the nontribal systems. While the motivation for cooperation and resolution of conflicts between systems may differ, the resulting relationships are, of course, affected by the input of all concerned subgroups.

As noted earlier, the sources of law are varied, and a discussion of the dynamics of a legal system is better informed if preceded by a clear understanding of origins. Certainly, when two or more legal systems are juxtaposed, ascertainment of their priorities and of the source of their laws is mandatory if a resolution of the inevitable conflicts is to be effected.

Custom is the most obvious source of law, exemplified to some degree by the common law as it is accepted in England,[28] and is evident in the use of unwritten, though often mentioned, tradition in many tribal courts.[29] Legislation and codification are sources of law which specify what will be considered proper or deviant conduct in the future. Though in many cases such law derives in part from custom (which amalgamates past experiences), codification is basically authoritarian law that is made in aspiration of developing an ideal society.[30]

Another major source of law is, of course, equity, which seems to have developed to fill the gaps and plug the loopholes created

28. H. EHRMANN, COMPARATIVE LEGAL CULTURES 21-22 (1976) [hereinafter cited as EHRMANN].

29. HARTLAND, *supra* note 7, at 214.

30. EHRMANN, *supra* note 28, at 24-29.

by codification of the ideal.[31] In a way, custom can be seen as embodying what we have been and to some degree what we are today; authoritarian law embodies to some degree what we are today and where we plan to move if all goes as it should; equity is the embodiment of the recognition that all does not always go as it should, and equity is the compromise source of law which deals with the realities of where we actually are today, taking into consideration the errors of our past and the ideals for our future.[32]

That legal organization responds to cultural,[33] social,[34] and economic stimuli[35] is not a newly discovered or particularly surprising fact. An interesting phenomenon occurs, however, when conquest by one group does not destroy the cultural, economic, and legal organizations of the subordinated group. In this case, a new legal level is created for both groups, and the resultant unifying system attempts, somehow, to reconcile the many differences of both systems. The changes in this case are originally effected, not by mutual agreement or gradual assimilation (though both are to some degree required if a functioning coexistence of legal systems is to occur),[36] but in response to the inevitable tensions that "develop because legal relation fails to correspond with social relation."[37]

> To bring about changes in the law it is generally necessary that social and political pressures be built up, and even after this appears to have been done the pressures can be deflected or arrested unless they are strong and specific enough.
>
> In times of real and perceived emergencies, of major technological breakthroughs, of social catastrophes and widespread indignation, law will make the jump that enables it to confirm or even accelerate social change.[38]

31. *Id.* at 29-31.

32. "[T]he relative importance given to these sources by the various legal families, or indeed by different members of the same family, varies strikingly. While in general cultural differences have been decisive for such preferences, historical situations, stability or upheaval, slow economic mutations, or a technological breakthrough may impose the use of one source rather than another. Throughout history each of these sources has had its ideological defenders who were inclined to see the virtues of wisdom and justice restricted to those sources that seemed to serve best their own interests and values." *Id.* at 21.

33. *See, e.g.,* POSPISIL, *supra* note 1, at 139-43 for Savigny's use of cultural factors.

34. *See, e.g., id.* at 130-38 for Montesquieu's use of social factors.

35. *See, e.g., id.* at 153-66 for Marx's and Engels's theories of law and economics.

36. *Id.* at 121-22.

37. SAWER, *supra* note 3, at 169.

38. EHRMANN, *supra* note 28, at 4.

Though all of the involved groups are required to confront the issues that accompany changes, it is the tribal group that has the greatest difficulty and faces the greatest change. The nontribal groups, nonetheless, are faced with potential waste of social resources and possible reactionism if they are not flexible and perceptive enough to recognize the problems and to work to minimize them.

Though there is no possibility of the federal and state governments in this country reverting to customary law, or allowing tribes to revert to their respective customary laws, still, an enlightened and sincere consideration of such laws, their origins, their functions, and their utility is necessary to legislative and judicial determinations vis á vis the tribes. The infinite number of questions which could be asked and then answered have been the concern of many lawmakers in the past. Cardozo in particular acknowledged the dilemma when he wrote:

> To what sources of information do I appeal for guidance? To what proportion do I permit them to contribute to the result? In what proportion ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule which will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?[39]

The respected anthropologist Paul Bohannon, in describing the realms of law, discussed the effects of multiple legal cultures within a legal system, noting a basic difference between those systems that are unified under a central and single power (one sovereign) and those that function under multicentric powers (multiple sovereigns, *e.g.,* federal and state, state and tribal). Bohannon's analysis termed the first a colonial law system and the latter an international law system. The colonial law system is characterized by "a systematic misunderstanding between the two cultures within the single power system, with constant revolutionary proclivities resulting from what is, at best, a 'working misunderstanding.' "[40] The major problem with this organization is that disparate goals and procedures lead to what seem to be ar-

39. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921/1971).
40. Bohannon, *supra* note 4, at 39.

bitrary legal results, and the resultant lack of consensus about such results inevitably leads to disagreements about the validity and fairness of the system. This is the situation today in this country, certainly with respect to tribal status; the majority lack of concern and understanding for tribal ways has resulted in tribal dissatisfaction with and scorn of the majority rules, and has caused antagonisms that have resulted in loss of time, money, and even lives.

Bohannon's conceptualization of the international law system would attempt to reconcile the differences between two or more interrelated systems, though a successful working solution has not yet been institutionalized.[41] Nonetheless, in a society that has allowed, at times even encouraged, conflicting tribal systems to remain and to become self-determinant, the development of a system based on the international law concept would be useful in eliminating wasteful struggles between subgroup power systems. Further, development of such a legal mode would have a desirable cohesive (as opposed to assimilative) effect because members of subgroups would be more inclined to accept resultant laws as just and thus binding upon their behavior. One cannot realistically expect compliance with laws that are not respected and that do not take into consideration basic major priorities.

The problem of multiple legal systems and levels cannot be solved through legislative and judicial channels alone, even if the developing laws, such as the Indian Child Welfare Act, are considerably more enlightened and cognizant of subgroup traditions. New laws must be internalized on both an individual and institutional level if they are to be accepted as customary. Compliance with a law is only the first step toward internalization, for an individual may comply with a law, not from any sense that it is fair, but from the fear of punishment. The second step is identification with or sincere acceptance of a rule, which stems from a desire to participate as a member in the social group responsible for propounding the rule. Internalization, the final step, is the result of an individual's acceptance of the rule "because he finds its content intrinsically rewarding."[42] Members of both groups must individually go through these stages before new laws can be said to be truly internalized. (Societal internalization is less con-

41. *Id.* at 41. *See also* Cohn, *Anthropological Notes on Dispute and Law in India*, in AMERICAN ANTHROPOLOGIST, *supra* note 4, at 109-11; EHRMANN, *supra* note 28, at 124-25 for attempts made in India, Africa, Japan, and Israel.

42. POSPISIL, *supra* note 1, at 201.

cerned with the psychological reactions to a given law; rather, once a number of individuals personally internalize a law, the societal internalization has occurred, and the law is supported as customary.)[43] Now, though many tribes do not necessarily accept all of the federal or state laws that bind them, they may accept as customary and just the laws established by their own tribal councils and courts; in such instances, though these councils and courts were once alien to the tribes, their existence has been socially internalized. Within some tribes, still, there are large numbers of people who have not internalized even their own tribal codes (products, after all, of a non-Indian mentality), though tribal codes are probably deferred to with greater frequency and less complaint than federal and state codes.

The Indian Child Welfare Act can be seen in many ways as a small attempt by the conflicting legal systems in this country to respond to numerous pressures and problems. While the tribal court systems are interested primarily in the protection of tribal resources (children) and the exercise of tribal sovereignty, the states are interested in preserving the rights of their non-Indian members (voters) and in maintaining jurisdiction over their territory. The federal government, as fiduciary to the tribes, is committed to a national policy of self-determination for tribes, while economically, politically, and otherwise it is committed to democratic ideals that place great emphasis on the welfare and desires of the majority—in this case, certainly not the tribes. The Indian Child Welfare Act is something of a compromise between the tribal and state courts, which are constantly warring over jurisdiction. It explicitly defines areas of jurisdiction, recognizing officially that the tribes have a compelling interest in the determination of the welfare of their members, including children, and that the tribes in many, if not most, instances are better able to handle the intricate domestic and religious relationships which do not have parallels in nontribal societies.[44] Such a law, by taking into account numerous factors of substantive and procedural law of both tribal and state systems, is more likely to be internalized, thus respected and followed, by members of all involved groups. Despite several shortcomings and potential problems, the Indian Child Welfare Act is a useful example of how a conflict of laws, resulting from a multiplicity of cultures, legal systems, and levels, may be resolved.

43. *Id.* at 204-206.
44. *See* 25 U.S.C. § 1901(5), 25 U.S.C. § 1915(d) (1978).

The Indian Child Welfare Act of 1978

Prior to the enactment of the Indian Child Welfare Act, tribes had several difficulties in exercising their interest and control over child custody proceedings. Not only did they continually have to fight to assert jurisdiction but also, even when such jurisdiction was established, tribes often had trouble enforcing the decisions of their courts because of the lack of full faith and credit attached to such decisions.

On the question of jurisdiction, state court rulings were confusing and often diametrically opposed to one another. After *Fisher*,[45] it was clear that tribes had exclusive jurisdiction when both parents and child were domiciled on the reservation. However, such an ideal fact situation does not always present itself, and off-reservation contacts frequently served as the basis for assumption of jurisdiction by state courts.[46] On the other hand, some states refused to take jurisdiction if a tribal court already had become involved in a dispute, even if the off-reservation contacts were many.[47] The unpredictability of jurisdictional assumption led to confusion and dissatisfaction among all parties concerned.[48]

Even in cases in which tribal courts did receive jurisdiction over proceedings, their decisions were not often respected or enforced. Though many states applied the doctrine of comity with respect to tribal court decisions prior to the Act, only Washington[49] and New Mexico[50] applied full faith and credit to such judgments. Several states explicitly rejected the application of full faith and credit to tribal law.[51] Although the court in Arizona did apply comity, it did not feel an obligation to recognize the validity of tribal court decrees, thus increasing the uncertainty inherent in child custody proceedings and allowing for state manipulation of laws and events to satisfy its own ends in the name of public

45. Fisher v. District Court, 424 U.S. 382 (1976).

46. *See* cases cited in note 22 *supra*.

47. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975); *In re* Buehl, 87 Wash. 649, 555 P.2d 1334 (1976).

48. Kirkwood, *supra* note 23, at 4-10.

49. *In re* Buehl, 87 Wash. 649, 555 P.2d 1334 (1976).

50. Jim v. CIT, 87 N.M. 362, 533 P.2d 751 (1975).

51. Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950); Lohnes v. Cloud, 254 N.W.2d 430 (N.D. 1977); Red Fox v. Red Fox, 542 P.2d 918 (Or. App. 1975).

policy.[52] Because application of comity does not require that deference be paid to tribal judgments, prior to the Act most states were able to find some way in which to weaken or even nullify tribal law, assuming even that the tribe had been successful in its acquisition of jurisdiction.[53]

The effect of such state control had, and continues to have, negative effects on tribes whose incentive to enter into reciprocal agreements with states is lessened because of the fear of increased state control over tribal affairs. It also lessens states' incentives to do likewise unless there is a potential benefit to the state, as most tribes do not have significant leverage.

> The implications of this lack of governmental interaction are significant. In the absence of mutuality, injustices for tribes and tribal members are common. Tribal members are often unable to enforce contract rights or other civil remedies which involve parties off the reservation. . . . Obviously, lack of cooperation encourages violators on both sides. More importantly, the result is the extension of existing antagonisms.[54]

The Indian Child Welfare Act provides something of a solution to these problems of jurisdiction and full faith and credit by specifying exclusive jurisdiction where a child is domiciled on-reservation,[55] by allowing for reassumption of tribal jurisdiction over custody matters in Public Law 280 states,[56] by requiring transfer from state courts to tribal courts (absent good cause or certain objections),[57] by allowing tribal right of intervention in those cases that remain in state courts,[58] and by entitling full faith and credit to tribal actions in child custody proceedings.[59] As a result, tribal courts have both the jurisdiction and the ability to enforce their judgments in such proceedings, ostensibly, if not in fact.[60]

Though there are still numerous problems in implementing the

52. Kirkwood, *supra* note 23, at 13. *See generally* Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes,* 7 N.M. L. REV. 133 (1977).

53. Jones, *Indian Child Welfare: A Jurisdictional Approach,* 21 ARIZ. L. REV. 1123, 1136-38 (1970) [hereinafter cited as Jones].

54. *Issues in Mutuality,* AM. INDIAN LAWYERS TRAINING PROGRAM, INC., 3-4 (1976).

55. 25 U.S.C. § 1911(a).

56. 25 U.S.C. § 1918.

57. 25 U.S.C. § 1911(b).

58. 25 U.S.C. § 1911(c).

59. 25 U.S.C. § 1911(d).

60. *But see* Jones, *supra* note 3, at 1145.

Act,[61] it is useful in its explicit delineation of jurisdiction and procedures, as well as in its recognition of tribal customs as a function of the law.[62] Basically, tribal jurisdiction is now exclusive in child custody proceedings where the child has residence or domicile on the reservation or when the child is a ward of the tribal court.[63] In other cases, a state is required to transfer the action to the appropriate tribal court unless one or both parents object or there is good cause why transfer should not occur. Either parent, custodian, or tribe may petition for such a transfer.[64] Further, both custodian and tribe have the right to intervene in any state court proceeding for foster care placement or for termination of parental rights.[65]

In the fact situation of *In re Doe*, pre-Act, the grandfather who petitioned for custody of his daughter's child was denied custody by the state court "in the best interests of the child."[66] Although the court noted the presence of tribal interest in the adjudication, its decision was predicated on factors testified to by

61. Appointment of legal counsel is a problem area, for the Act does not specify when this is to occur or who is to pay for such services. Neither does it specify whether appointment may be waived or whether it is mandatory.

Emergency removal of Indian children provides another loophole for state placement without notice or other safeguards. The procedure is further complicated by a failure of the Act to specify who pays for the placement and who provides and pays for transportation of the child when he is finally returned to his home.

There are many other minor problems attendant upon the Act. Who can make demand for the return of a child, and when? Can a tribal court subpoena non-Indian experts and witnesses to testify, and who pays for their appearance? Where should records be maintained, who can request them, and how are independent adoption records to be handled? Is another hearing required before changing foster home placements; if so, who must be notified?

In many cases, jurisdiction will remain in state courts while tribes undergo the lengthy process of retrocession. In adoption proceedings, there is no right of tribal intervention, even though such participation is more likely to ensure better placement. The lack of funding for family programs and subsidized adoptions has, of course, hindered implementation of these policies. *See generally*, Miles, *supra* note 23, at 664; Barsh, "The Indian Child Welfare Act of 1978 and Why It Will Fail" (unpublished work in American Indian Law Center Library) (hereinafter referred to as Barsh); Marousek, *The Indian Child Welfare Act of 1978: Provisions and Policy*, 25 S.D. L. REV. 98 (1980) [hereinafter cited as Marousek].

62. *See, e.g.*, 25 U.S.C. § 1903(2), 25 U.S.C. § 1903(12).

63. 25 U.S.C. § 1911(a).

64. 25 U.S.C. § 1911(b).

65. 25 U.S.C. § 1911(c). The Act also provided for notice to be given (§ 1912(a)), for counsel to be appointed (§ 1912(b)), for examination of records (§ 1912(c)), for proof of the failure of remedial services and efforts (§ 1912(d)), and for evidentiary standards for both foster care placement and termination of parental rights (§§ 1912(e), 1912(f)).

66. *In re* Adoption of Doe, 89 N.M. 606, 555 P.2d 906 (1976).

social workers, *e.g.*, the child's slow development, the grandfather's age and employment, the child's domicile in Gallup. There was not much weight given to the tribal customs or abilities to fulfill the child's cultural, religious, and social needs. Post-Act, the grandfather, as a custodian, could petition the court for transfer to the Navajo Tribal Court, providing that the parents did not object. Once such transfer was effected, the tribal court would be better informed as to how to settle the custody battle. Even if one of the parents did object to the transfer, both the tribe and the grandfather would have the right to intervene in the state court proceedings to present their unique testimony and evidence as to the disposition. Furthermore, placement preference, by statute, would have been given to the grandfather or other member of the child's extended family, and prevailing Navajo community standards would have to be followed in ultimately determining placement.

When a parent voluntarily consents to a termination of rights, the Act requires that specific procedures be followed and that certification be given by the court that the parent fully understands the consequences, which must be explained in language the parent understands.[67] Consent to foster care placement may be withdrawn by a parent or custodian at any time,[68] and even voluntary termination of parental rights may be withdrawn at any time before a final decree of termination or adoption is entered.[69] Violation of such provisions may result in the invalidation of placement or parental right termination.[70]

As mentioned, placement of children in foster or adoptive homes requires that preference be given to specified tribal members and families or to appropriate homes approved by the tribe,[71] and the standards to be applied are those of the Indian community.[72] Improper removal of a child by a petitioner in state court will result in the return of the child to the parent or custodian, and the state court is obligated to decline jurisdiction over the petition.[73]

Provision is made for emergency removal or placement by the state of an Indian child living off-reservation in order to prevent

67. 25 U.S.C. § 1913(a).
68. 25 U.S.C. § 1913(b).
69. 25 U.S.C. § 1913(c).
70. 25 U.S.C. § 1913(d).
71. 25 U.S.C. §§ 1915(a), 1915(b), 1915(c).
72. 25 U.S.C. § 1915(d).
73. 25 U.S.C. § 1920.

imminent physical damage or harm to the child, but said removal terminates when it is no longer necessary. At that point, the state court must initiate proceedings in keeping with the Act to transfer jurisdiction to the tribal court or to return the child to its parents or custodian.[74] The remainder of the Act deals with funding and recordkeeping.[75]

These specifications and requirements give effect to tribal customs and authority to a degree that has not previously occurred in tribal-state relations. The Indian Child Welfare Act codifies federal recognition of the utility and validity of tribal legal systems and laws, both customary and legislative, but problems in interpretation and implementation remain.

Major constitutional issues continue to confront individuals and courts in their dealings under the Act. The jurisdictional provisions are subject to challenge on the basis of an equal protection argument, and both jurisdictional and procedural provisions are subject to challenge by states' rights arguments.[76]

The tenth amendment gives states certain reserved powers,[77] one of which seems to be the right to regulate domestic relations and state court procedures within state boundaries.[78] Congressional power over Indian affairs prevents states from infringing upon essential tribal relations, at least those occurring on-reservation.[79] The Indian Child Welfare Act, in establishing tribal jurisdiction over Indians off-reservation and in imposing procedural guidelines, clearly affects the states' reserved powers, though the Indian commerce clause,[80] the Bill of Rights,[81] and the supremacy clause[82] appear to allow this infringement in the interests of tribal sovereignty and self-determination.[83] Nonetheless, many states are bound to disapprove of this removal of state power and, even if they avoid a direct challenge to the Act, may decide to take advantage of the various ambiguities and loopholes in the Act in order to retain state control.

74. 25 U.S.C. § 1922.
75. 25 U.S.C. §§ 1931-63.
76. Marousek, *supra* note 1, at 101.
77. U.S. CONST. amend. X.
78. *Ex parte* Burrus, 136 U.S. 586 (1890).
79. *See, e.g.,* United States v. Quiver, 241 U.S. 602 (1916) (state has no power over domestic affairs between Indians on-reservation).
80. U.S. CONST. art. 1 § 8 cl. 3.
81. U.S. CONST. amends. I-X.
82. U.S. CONST. amend. X.
83. Marousek, *supra* note 1, at 105-107.

The fifth amendment presents another problem, as it prohibits discrimination on the basis of race.[84] Though classification of a child as Indian for purposes of the Act can be seen as racial discrimination, that argument is not likely to prevail as the Supreme Court has already addressed the issue on several occasions, notably *Morton v. Mancari*.[85] A better argument could be made that equal protection of Indian children is violated by denying them the benefits of state court. Aside from the distinct unlikelihood that such benefits do in fact exist for Indian children, the Supreme Court has indicated that the "disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the Congressional policy of Indian self-government."[86] Another equal protection issue is raised concerning the different rights of Indian and non-Indian custodians. This problem remains to be resolved in litigation and will probably be subject to varying interpretations, depending on the individual fact situations.

Assuming that the issues of constitutionality do not prevent the implementation of the Act, recognition and enforcement of tribal decisions will present other hurdles for tribes. Since 1855, federal courts have held that full faith and credit is to be applied to tribal court judgments,[87] but later state court decisions held otherwise. Though Washington and New Mexico have once again recognized full faith and credit, other states have hesitated, often preferring instead to exercise comity, which does not compel enforcement of tribal decrees. The full faith and credit clause of the Act requires all states to give full faith and credit "to the extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."[88] By specifying "entity" instead of "state," the Act leaves open many possibilities for states to apply comity and not full faith and credit to the proceedings of other entities, or which may decline even to exercise comity, in the absence of reciprocal agreements.[89] Also, the failure to require reciprocity may seem inconsequential considering that the major problem has always been in getting state

84. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (fifth amendment due process = fourteenth amendment equal protection).

85. Morton v. Mancari, 417 U.S. 535 (1974).

86. Marousek, *supra* note 61, at 106.

87. Raymond v. Raymond, 83 F.721 (1897); Standley v. Roberts, 59 F. 836 (1894); Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855).

88. 25 U.S.C. § 1911(d).

89. *See* Kirkwood, *supra* note 23, at 23; Barsh, *supra* note 61, at 9-16.

courts to recognize tribal decrees, and not vice versa. However, failure to specify reciprocity is inconsistent with the traditional notions of full faith and credit and leaves potentially nasty issues about the requirement of tribal courts to enforce state judgments.[90]

Major difficulties in applying the Act stem from questionable or vague definitions and terminology. The Act establishes tribal jurisdiction and priority in child custody proceedings,[91] but:

> The Act does not cover placements in divorce proceedings, or placements based on acts that, "if committed by an adult, would be deemed a crime": that is, placements after an adjudication of delinquency. It does, however, cover placements related to status offenses such as truancy, running away, or curfew violations.[92]

Neither does it apply to proceedings which determine neglect or abuse or the need for in-home supervision. Thus, state interference continues to be permitted under the Act, though it may very well cause psychological damage to the family, resulting in pressures and problems for those whom the Act was intending to benefit.[93] In many areas, such as informal dispositions and extensions of orders, state law may continue to conflict with Act guidelines because state procedures frequently do not have procedural correlates in the Act.[94]

Though the Act specifies transfer to tribal court in many circumstances, state interference is not limited to informal dispositions; when the state courts do retain jurisdiction, concurrent or otherwise, they are not required to apply tribal law, either customary or authoritarian. They are constrained by the requirement that they apply "the prevailing social and cultural standards of the Indian community"[95] but the substantive law is state law.[96] Undoubtedly, the choice of laws under such circumstances almost

90. Also, full faith and credit is never required if the first court lacked jurisdiction. Since subject-matter jurisdiction in custody cases is based on domicile, a determination that is flexible and confusing, state courts may very well use this as a loophole to escape the full faith and credit requirement. *See* Kirkwood, *supra* note 23, at 24.

91. 25 U.S.C. § 1903(1) (Supp. 1979).

92. Marousek, *supra* note 61, at 102.

93. *See* Miles, *supra* note 23, at 666-67; Limprecht, *supra* note 23, at 1218-19.

94. Limprecht, *supra* note 23 at 1226.

95. 25 U.S.C. § 1915(d).

96. *See, e.g.*, 25 U.S.C. §§ 1912(b), 1912(c), 1912(d), 1913(b), 1914, 1915(a), 1915(e), 1916(a), 1921, 1922.

has to be that of the forum state, as the difficulties in having state courts apply tribal law are mind-boggling, as can be imagined. Still, the dichotomy of having state courts apply state laws to tribal relationships encourages misuse and is further confused by section 1921, which provides for the application of higher standards of protection in the event that state law conflicts with Act guidelines. Ironically, the result is inadequate in that essentially it asks state courts to compare their laws with the Act's provisions and then to apply whichever the state court happens to feel is superior.[97] In many of the nebulous areas, decisions will turn exclusively on state officials' arbitrary tendencies to interpret the Act liberally or restrictively, as is their wont.[98]

Vagueness in definitions runs throughout the Act. For example, in defining an Indian child, the Act excludes all children who are not eligible for enrollment in a tribe,[99] even if the child's biological parents are enrolled tribal members. Blood quantum requirements vary from tribe to tribe and were originally established merely as a basis to determine service responsibilities of the federal government; in the context of the Act, however, they serve to deny tribes domestic control over many children who are, for most other intents and purposes, Indian,[100] Furthermore, children of many Alaskan natives are not qualified as "Indian children" under the Act.[101] This leads to the incongruous result that many children of Alaskan natives, born after 1971, will not be considered Indian for the purpose of the Act until their grandparents die. Once the parents then inherit the "village shares," the children magically "become" Indian, though the metamorphosis may be too late to prevent their unjust placement.[102]

Further ambiguities arise in trying to determine who are extended family members, as custom on this issue varies from tribe to tribe, and often differs from the law. As most tribes do not have official publications of their customs, state officials have great difficulty in applying those provisions of the Act which specify extended family members as interested parties. Also, membership requirements of each tribe are not presently available

97. Barsh, *supra* note 61, at 23.
98. Limprecht, *supra* note 23, at 1226.
99. 25 U.S.C. § 1903.
100. Barsh, *supra* note 61, at 5.
101. *Id.* at 6-7.
102. The Act does not consider children of terminated tribes to be "Indian children" for the purposes of the Act, even if their parents are fullbloods.

to state officials who often have to adjudicate issues dealing with membership. Though membership criteria are often spelled out in tribal constitutions, unwritten criteria are still the basis for many tribal determinations of membership.[103]

Consideration of these and other tribal standards are extremely important in the development and function of a legal system, but it is quite difficult to identify and give proper priority to these factors for judicial consideration. Vagueness and flexibility can be manipulated by state courts to their own ends. The difficulty is exaggerated for those officials who are unfamiliar with tribal and intertribal issues. The Act is silent on resolution of intertribal conflicts, for example, in the area of jurisdiction. Strict construction would assert jurisdiction in the tribe with which the child resides; purposive analysis would find jurisdiction in the tribe of which the child is a member. Though the Act was intended to increase tribal jurisdiction, it may be appropriate that it does not specify guidelines for solving intertribal conflicts, preferring instead to let the tribes involved work it out between themselves.[104] Nevertheless, if a child is a member or potential member of more than one tribe, the Act treats the child as a member of the tribe with which it has the most significant contacts. Notification of intent to seek custody is required then only to be sent to one tribe, despite the fact that the child, its parents, or its other tribe may have vital interests in the adjudication. Though the notified tribe might decline to intervene and the unnotified tribe might be interested in intervention, the petitioner for custody is able to satisfy the Act's requirements without any further tribal input,[105] since the Act requires only that one tribe be notified.[106] This may seem insignificant, but when faced with the large number of intertribal marriages and offspring, it appears increasingly important that both tribes be identified.[107]

103. *See, e.g.*, Note, *Tribal Sovereignty: Santa Clara Pueblo v. Martinez: Tribal Sovereignty 146 Years Later,* 8 AM. INDIAN L. REV. 139 1980).

104. Kirkwood, *supra* note 23, at 20.

105. Barsh, *supra* note 61, at 12.

106. *Id.* at 27.

107. Further state power is given in cases of the Pub. L. 280 states. Though the Act allows for the transfer of a custody proceeding involving children residing off-reservation, it does not appear to allow for the transfer of proceedings for those children residing on-reservation if the reservation is in a Pub. L. 280 state, and if the child is a member of another tribe. This is a further example of the difficulties in intertribal membership. By determining which tribe a petitioning party wishes to give notice to, that party effectively selects the tribe eligible to accept transfer, and conceivably this could result in a species of forum shopping, as a petitioner may (with varying degrees of difficulty) prefer to notify

Notice itself presents several problems, from trying to figure out who is a tribe's designated agent for service to locating and identifying the child's custodian and tribe.[108] The Act is unclear about what to do when the parent or custodian and the tribe cannot be determined. It specifically allows for the notification of the Secretary of the Interior if neither the parent or custodian nor the tribe can be identified, but it does not seem to require such notification if only one of the parties is unidentifiable; yet the state court cannot proceed unless both have received notice. Once the secretary is notified, he is allowed fifteen days to notify both parent or custodian or tribe, but if he fails to do so in a timely manner, there is no provision for recourse should the time allowable for intervention pass.[109] Because of the inconsistencies and questions arising on the issue of notice, the simplest thing for states to do is routinely to notify the secretary, thus avoiding all confusing contact with tribes, tribal parents, and guardians.

> This problem will encourage state agencies to avoid parents and tribes altogether and routinely send notice directly to the Secretary. Besides being simpler and faster, notifying the Secretary almost guarantees parents' and tribes' non-participation in the court proceedings. The Secretary has fifteen days to attempt to notify the parents and the tribe, but the state court can proceed after only ten days. Indeed, the child could be placed or adopted before the Secretary's time to notify the parents and tribe has expired.[110]

Once notice has been given directly to a tribe, the tribe may decline to have the custody proceeding transferred, if the tribe can figure out the procedure for such a declination. It is unclear from the Act whether failure to answer is itself sufficient or whether the response must be oral or written.

Transfer can be prevented if a parent objects to it (unless the child is domiciled on-reservation), if no parental rights are being severed, or if the state finds "good cause" not to transfer.[111]

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that tribe he feels would be less interested in becoming involved in the custody issue. (*See* Barsh, *supra* note 61, at 15-16). The transfer right is not automatic and must be preceded by a timely request for such a transfer, thus limiting the right of intervention, as it is apparently in the judge's discretion as to what "timely" means.

108. Miles, *supra* note 23, at 667.

109. Barsh, *supra* note 61, at 13-14.

110. *Id.* at 14.

111. Jones, *supra* note 53, at 1139. Even if the parents don't agree to transfer, it is not clear from the Act who is to prevail. Legislative history suggests that the parent who

"Good cause" as discussed in the legislative history seems to mean forum non conveniens, but even if so limited, which is arguable, there are enough factors that may be considered in a determination of "good cause" as to make it a useful tool for those state forums which are reluctant to transfer proceedings into tribal court.[112] The ironic result is that the Act, which has as one of its purposes to remove the destiny of Indian children from the hands of state judges who have been notoriously incapable of recognizing the relevant cultural standards of tribal people, specifies that the remedy of transfer be at the discretion of these very judges.[113]

Placement preferences are also subject to "good cause" exceptions and may easily result in placement of Indian children in non-Indian homes. Additionally, preference of the parent or child will only be considered "where appropriate," which means, for example, that if a single parent requests placement of the child with a non-Indian family, the tribe would not even be entitled to notice.[114] Invalidation of the placement is allowed specifically for violations of the notice and transfer provisions, but the Act does not specify what happens if certain other provisions, such as placement preferences, are violated.[115]

A parent's desire for anonymity may also be used to place Indian children with non-Indian families, for in this instance the court would not be compelled to reveal familial or tribal affiliation, thus substantially reducing the child's chances of being placed in an Indian home.[116]

In order to limit the removal of Indian children from their homes, the Indian Child Welfare Act has established standards of proof and procedures which must be met. Realistically, however, the quality of expert testimony weighs more heavily than the

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objects to transfer wins, at least as against the tribe, though not necessarily as against the other parent or guardian. There is also sentiment to the effect that the parent requesting transfer should be favored. (*See* Kirkwood, *supra* note 23, at 21.) The question gains in complexity when one of the parents is non-Indian, and when the parents are from two different tribes, only one of which, of course, will receive notice and the option to exercise jurisdiction.

112. *Id.* at 1142-44.

113. Barsh, *supra* note 61, at 17, 28.

114. Jones, *supra* note 53, at 111.

115. Barsh, *supra* note 61, at 21. Also, to invalidate a placement for lack of notice, it must be proven not only that the child in question is Indian but also that the state court knew, or had reason to know, of that fact. This sort of loophole seriously jeopardizes tribal ability to enforce its control and exercise its interest.

116. Jones, *supra* note 53, at 111.

quantum of proof.[117] Because there is no definition of "expert" in this context, and because the Act does not require the testimony of tribal members and professionals, the end result will be that many state courts will listen to the same individuals and agencies who were testifying in custody proceedings prior to the Act.

Finally, before removal of an Indian child from his home, the Act requires a showing that sincere efforts have been made to improve the family situation. Of course, a determination of what is adequate may differ from county to county, state to state, and in the end the responsibility of making the important decision is left in the hands of the state courts.[118]

Conclusion

The Indian Child Welfare Act of 1978, while in some ways merely a codification of state and federal judicial law, is a significant step toward realizing the conflicts inherent in a legal system that is actually a conglomeration of legal systems, each with its own sovereign and legal level. The Act is important for its attempt at resolving certain of these conflicts by specifying jurisdiction and procedures, and could perhaps be useful as a model for future legislation dealing with the interaction of states and tribes. It is unique in its recognition of major cultural differences between tribal people and the American society as a whole.

A number of other solutions could have been arrived at, for the Act could have specified that Indian child custody proceedings be placed in any one of three judicial forums: federal, state, or tribal. And the choice of law could have been exclusively federal, state, or tribal. Such an exclusive remedy would be unrealistic and unfair, given the interests of all three governments in the final adjudication of domestic rights. The Act as it stands preempts certain states' rights in favor of tribal self-determination, striking a compromise without running into serious constitutional issues. Moreover, although it could have specified the application of tribal law by state courts in such of the proceedings as they have jurisdiction over, the result would have led to insurmountable problems as state court judges attempted to deal with the very issues which the Act presupposes they are incapable of understanding and handling. Thus, the dual jurisdiction of state and tribal courts, each applying their own laws, ap-

117. Barsh, *supra* note 61, at 19.
118. *Id.* at 4.

pears to be the most workable of solutions from a practical standpoint.

The solution is not without a multitude of shortcomings, however, which stem largely from a failure to address certain major conflicts and from a failure to define various key terms and concepts. It is difficult to be specific in writing a law that must encompass all tribes and all states, for the individual needs and abilities of each vary considerably, and there is also the danger of becoming too specific, thereby destroying the flexibility that is necessary in dealing with individualized fact situations.

Nonetheless, as it is currently enacted, the Act will not necessarily function as much of a deterrent to those states that wish, for one reason or another, to retain jurisdiction over Indian child custody proceedings. The ambiguities, the numerous loopholes, the wide discretion left to state court judges, all work to the advantage of any state court with a desire to employ them. The expectation is that state courts will be willing to comply with the spirit and intent of the Act; this can be encouraged by strong tribal agencies and serious tribal court participation in custody and placement proceedings. If both tribes and states work together in administration pursuant to the Act, it is possible that the final result will be the implementation of a miniature version of Bohannon's international law system whereby conflicting sovereign powers function together to produce an equitable and respected result. As provisions and terminology of the Act are litigated, and precedent begins to be established by way of additional guidelines for states and tribes, this result will perhaps be more apparent.[119] Of course, if the Act is unsuccessful, states and tribes will remain with their conflicting ideas and laws, and the resolution of the many problems will need to be sought in additional cohesive legislation.

119. *See, e.g.*, Johnson v. Frederick, 467 F. Supp. 956, 959 n.3 (D.N.D. 1979) ("Congress in enacting the Indian Child Welfare Act specifically recognized the importance of allowing tribal courts to assume full responsibility for placement of Indian children by granting tribes exclusive jurisdiction over such proceedings.").